

Reportable

IN THE HIGH COURT OF SOUTH AFRICA (EASTERN CAPE, PORT ELIZABETH)

Case No: 1669/2010
Date Heard: 1/07/2010
Date Delivered: 15/07/2010

In the matter between

ROYAL ALBATROSS (PTY) LTD

First Applicant

KIRT HERMAN

Second Applicant

and

DEKRA AUTOMOTIVE (PTY) LTD

First Respondent

DEKRA AUTOMOTIVE HOLDINGS (PTY) LTD Second Respondent

JUDGMENT

REVELAS J

[1] The applicants approached this court in urgent proceedings, seeking a declarator to the effect that the dismissal of the second applicant on 3 June 2010 by the first respondent was unlawful and invalid, and further, an order reinstating the second applicant in his former position as area manager of the first respondent. The applicants expressly disavowed any reliance upon the provisions of the Labour Relations Act 66 of 1995 ("the LRA"), and submitted that they only seek to enforce their common law contractual rights and constitutionally entrenched rights to "fair labour practices" guaranteed by section 23(1) of the Bill of Rights in the Constitution.

[2] The employment relationship between the second applicant and first respondent arose from an agreement of purchase and sale of the first applicant's business to the first respondent as a going concern. The first applicant conducted the business of roadworthy testing, technical examinations and multipoint checks in respect of many types of vehicles. It also provided other motor industry related services from selected locations in, *inter alia* East London and Port Elizabeth. The second applicant was its director.

[3] On 6 October 2009, the parties concluded the aforementioned agreement in terms whereof the first applicant's business would be sold to the first respondent, who already owned forty testing stations in the country. The agreement was signed by the second applicant who concluded the agreement on behalf of the first applicant.

[4] The terms of the agreement most relevant to the present application were the following:

- (a) The purchase price of R9 million was payable to the first applicant in three distinct payment phases. The first payment would be upon the successful transfer of certain licenses to the first respondent. The first payment, would be R5 million. This first phase was completed.
- (b) The second phase was the payment of R2 million if targets relating to the nett profit of the business before taxation, and its turnover were achieved by 30 April 2010. This payment was also conditional upon the successful transfer of certain licences and warrantees.

- (c) If the targets were not achieved, this payment (of R2 million) would be carried over for determination in the third phase, in October 2010, when the last R2 million was due. In this month, the first respondent would pay R2 million or R4 million also, depending on the achievement of certain targets relating to nett profit and turnover.

[5] The targets at certain future dates were certainly material terms and preconditions for payment, since they account for almost half of the actual purchase price. To this end, clause 4.1.13 of the agreement provided for the second applicant's continued management of the business as area manager for a period of twelve months (which would come to an end in October 2010), or until the expiry of the said period (also October 2010) at which, if certain targets were achieved, R4 million was payable to the first applicant.

[6] Given the events which followed and which brought the parties to court, the conditions relating to the second applicant's appointment as manager should be quoted in full:

"4.1 *The rights and obligations of the parties under this agreement are subject to, and conditional upon the fulfilment of all of the following suspensive conditions by no later than 30 September 2009. ...*

"4.1.13 *The employment of Kirt Herman as the area manager – DEKRA Automotive Eastern Cape at a cost to company (CTC) package of R480 000 per annum for a period of 12 months, in accordance with a proper employment contract, which will clearly outline an authority mandate including the scope of his authority and obligations within*

DEKRA Eastern Cape, which may change from time to time as agreed by both parties; ..."
(emphasis added)

[7] No additional formal contract of employment (or 'proper employment contract') was ever concluded between the parties, but the second applicant continued to work for the first respondent at a salary and all went well until a few months later, and in particular, the period before the end of April 2010, when the second payment by the first respondent became due and owing.

[8] The second payment was not made on 30 April 2010. The first respondent explained that this payment would be based on sales figures up to and inclusive of 30 April 2010, having been collated and audited before payment could be made. The condition that certain licences and warranties be transferred was fees also not complied with. The second applicant said he believed that the first respondent had cash flow problems (a fact which was vehemently denied by the first respondent and seemed improbable on these papers considering its many other testing stations) and took matters in his own hands.

[9] On 10 May 2010 the first applicant transferred R1 182 570.60 from the first respondent's bank account into the first applicant's bank account and subsequently, on 18 May 2010 he transferred R1,130,000,00 out of the latter account into an account of a company called Dandyshelf CC, controlled by himself. The second applicant had no authority to transfer the money as he did. Technically it constituted theft. The first respondent addressed the second applicant's fears of non-payment by requesting him to transfer the money back into the first respondent's account and

offered to retransfer it back immediately and proffered a breakdown as to how the remainder would be paid to the first applicant.

[10] This act of misconduct was not the only cause of the first respondent's displeasure with the second applicant as manager. According to the first respondent, the second applicant also spent R9 740.00 of its money on his private vehicle without authorisation and granted to himself, five unauthorized loans amounting to R80 128.18. He allegedly also instructed staff members to deposit all cheques received into the first applicant's bank account, contradicting a standing instruction and certain clauses of the warranties set out in Annexure "A" of the agreement of sale. It was further the first respondent's case that the employees of the business were informed by the second applicant that they were not employed by the first respondent (as they *de facto* were, as a result of it having purchased the business as a going concern), but by the first applicant (the seller). The second applicant allegedly also told the employees that the first respondent was insolvent. All the aforesaid, the first respondent saw as breaches of the agreement of sale, in particular clause 22 thereof which requires the parties to the agreement to act in the utmost good faith with each other.

[11] On 26 May 2010 the second applicant was suspended by the first respondent pending the outcome of the disciplinary enquiry to be held into the allegations set out above, which were embodied in a charge sheet. The second applicant contended that he was not an employee, and the chairperson, in the first part of the hearing, held on 2 June 2010, made a ruling that the second applicant was indeed the first respondent's employee, as born out by the agreement of sale and the law. The second part of the disciplinary hearing was held on the 3rd of June 2010, in the absence of the second applicant who was only notified of the hearing the previous evening that the hearing would be held at 09h00 the following morning.

[12] The second applicant was dismissed on that day. The chairperson of the hearing, had immediately prior to the hearing, represented a Mrs Yolande Barnard, the first respondent's Relationship Manager in Rosslyn (Gauteng) presently acting as area manager since the second applicants suspension, in civil proceedings in the Magistrate's Court against the second applicant. At her behest, an interim interdict was obtained in the Magistrate's Court in Port Elizabeth, prohibiting the second applicant from coming within 150 metres of the six premises, formerly under control of the first applicant.

[13] The applicant's challenge to his dismissal and the process followed to facilitate it, was firstly, that the chairperson, Mr Bosch, was bias, as a result of his direct involvement in the interdict sought by Mrs Barnard, who was also the complainant in the disciplinary hearing. Mr Bosch was also the first respondent's in-house labour consultant. Secondly, the second applicant argued that he was not afforded sufficient time to prepare for the disciplinary hearing due to the short notice period given in a fax he does not recall receiving. Thirdly, it was argued by the applicants that the mediation/arbitration clause (clause 17) in the agreement of sale, in terms of which all disputes between parties arising from the agreement would be mediated, and if to no avail, arbitrated, precluded any disciplinary enquiry into the misconduct of any of the parties to the agreement.

[14] Inasmuch as the aforesaid challenges are aimed at the alleged procedural unfairness of the dismissal, the main thrust of the applicants' case is that by seeking the second applicant's reinstatement in his position as area manager, albeit only until the end of October 2010, they are seeking no more than the

enforcement of specific performance of the common law contract concluded with the first respondent.

[15] The first question to be determined in this matter is the question of jurisdiction. The respondents argued that this matter should have been pursued in the LRA Forums, in other words, the second applicant should have referred his dispute with the first respondent about an alleged unfair dismissal to the Commission for Conciliation Mediation and Arbitration (the CCMA), or a relevant bargaining council, to arbitrated.

[16] In support of their argument that the High Court indeed had the necessary jurisdiction to decide this application, the applicants relied on the matter of *Makanya v University of Zululand* [2009] 4 All SA 146 (SCA). In that matter the appellant contended that the termination of his services constituted a breach of contract. He then tendered his services but was not remunerated. He instituted action for orders compelling his former employer to pay him his remuneration and other monies under his contract of employment with them, and not reinstatement. Nugent JA, presiding in the aforesaid appeal, in paragraph [4] page 149 of his judgment with regard to the jurisdictional objection raised, said: "Whatever explanation is given, invariably leads one back to the decision of the Constitutional Court in *Chirwa v Transnet* 3 2008(3) BCLR 251 in which the majority expressed the view that the High Court had no jurisdiction to consider the claim in that case". (A claim to set aside a dismissal)

[17] The learned judge of appeal then concluded the *Chirwa* was not about jurisdiction at all, and that the High Court was not precluded from entertaining an application by an employee for the enforcement of his contract of employment. In the same matter, in

paragraphs [35] to [41], three other matters where jurisdictional challenges were raised were referred to. They are United Public Servants Association of South Africa v Digomo NO [2005] 26 ILJ 1957 (SCA); Boxer Superstores, Mthatha v Mbenya and Another 2007(5) SA 450 (SAC) and Fredericks v MEC for Education and Training, Eastern Cape 2002 (2) BCLR 113 (CC).

[18] Nugent JA was of the view that none of the aforesaid cases were actually about jurisdiction, but about whether the claims in those cases were good in law, and that the claimants in each case, (dismissed employees) had a potential claim for enforcement of an LRA right (which was enforceable only in a Labour Forum), but each claimant also had a potential claim for the enforcement of a right outside the LRA, enforceable either in the High Court or in the Labour Court. He held that the claimant in each case was capable of pursuing both claims in the Labour Court, either simultaneously or in succession. None of these claims were for reinstatement.

[19] There were judgments, apart from *Makanya*, which also do not support the applicants' argument in this matter. In Gcaba v Minister for Safety and Security and Others 2010 (1) SA 238 (CC) it was held that Section 157 (2) of the LRA, which confirmed the concurrent jurisdiction of the Labour and High Court in the circumstances prescribed therein, could not be read to permit the High Court to have jurisdiction over those matters that fell within the exclusive purview of the Labour Court (paragraphs [70] – [72] at 261 E – 262 F).

[20] In Tsika v Buffalo City Municipality 2009 (3) SA 628 ECD the plaintiff, a dismissed municipal manager, claimed payment to him by the defendant, in the High Court, of R2 071 359.23 with interest. The amount comprised of an amount deducted by the defendant

from two preservation fund policies into which part of the plaintiff's salary had been paid, and a further amount of R1 800 000.00, the equivalent of eighteen months of his gross salary in terms of a clause in his contract of employment which he claimed entitled him to the aforesaid amount as an *ex gratia* payment. He did not claim reinstatement. The defendant, *in limine* raised a special plea that the Court lacked jurisdiction to hear the matter, relying on the judgment in *Chirwa*. The plea was dismissed. Grogan AJ, who presided in the case, recognised that for purposes of deciding the matter before him, he was "compelled to enter the murky waters stirred up by the debate over *Chirwa*" and, with respect, did so in a manner which brought more clarity and certainty to this debate.

[21] To sum up from the head note in *Tsika*, the law as it stands on the jurisdiction of the High Court in labour and employment matters is as follows:

- (a) In matters in which the cause of action is covered by the LRA and for which the LRA provides a remedy, fall within the exclusive jurisdiction of the Labour Court, and therefore outside the jurisdiction of the High Court.
- (b) Employees of statutory institutions may not bring actions in the High Court under PAJA, or by way of application for common-law review in respect of matters covered by the LRA.
- (c) Employees may not bypass the LRA dispute-resolution procedure and approach with claims based on their constitutional right to fair labour practices.
- (d) The High Court and other Civil Courts retain their common-law jurisdiction to entertain claims for damages arising from alleged breaches of contracts of employment and the acts or commission of either party after the termination of

employment and the Labour Court has concurrent jurisdiction to determine such matters. (Paragraph [66] at 653 E – 654 A).

[22] From the aforesaid it is clear that if the second applicant had sued for damages arising from his contract of employment, he would have been in the right court. However, his pleaded case is that his dismissal was unlawful and that he seeks reinstatement. This type of claim belongs in the LRA Forums and not this Court.

[23] *Tsika* was also referred to Wallis AJ in *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 at paragraph [7] 608 F – G. The respondent claimed damages in the High Court after pursuing his remedies under the LRA and, reaching a settlement agreement with the appellant for the payment of remuneration, (twelve months' salary). The claim for damages in the High Court was for what he would have earned, had he not been dismissed. The appeal succeeded and the respondent's claim for damages was dismissed. Wallis AJA rejected the notion that an employee was entitled to damages and statutory compensation based on unfair dismissal. In this regard he referred to a case decided in the United Kingdom, *Johnson v Unisys Ltd* [2001] ALL ER 801 (HL). In that matter, an employee who was summarily dismissed referred a dispute to a labour tribunal which held that his dismissal was unfair and awarded him compensation in terms of the English equivalent of the LRA provisions governing unfair dismissals.

[24] In addition, the employee sued for damages based on unfair dismissal. He argued that apart from his statutory rights, there was also an implied term in his contract of employment of trust and confidence, and based thereupon, it was not open to his employer to dismiss him unfairly. The main reason for dismissing his claim

was that the court felt that *"a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed..... It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals not the ordinary courts of law."*(at 803 g – j).

[25] Wallis AJA (with whom Nugent JA concurred), associated himself with the aforesaid views and added at paragraph [33], page 620 F – I. *"... there is the further bar South Africa that the legislation in question has been enacted in order to give effect to a constitutionally protected right, and therefore the courts must be astute not to allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied term in contracts of employment."*

[26] What is to be understood from the aforesaid judgments, is that an employee may seek damages for breach of contract or moneys owing in terms of his employment contract in the High Court, in certain circumstances, but may not seek reinstatement (a statutory remedy) based on his dismissal, in the High Court, in any circumstances because the LRA already includes the protection that is necessary.

[27] Very apposite to this matter, and also quoted by Wallis AJA in the *SAMSA* matter (at paragraph [33] G – H), is the following, passage from *Chirwa* in paragraphs 16 – 18:

"The LRA includes the principles of natural justice. The dual fairness requirements are one example a dismissal needs to be substantively and procedurally fair. By doing so, the LRA

guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the *audi alteram partem* principle and the rule against bias. . . . Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not be subjected to unfair labour practices.”

[28] In deciding this matter, I have considered carefully, whether or not the agreement of sale which gave rise to the second applicant’s employment with the first respondent could be construed to oust the application of the LRA to the situation in which the second applicant found himself, and whether I could permit him to enforce specific performance by way of reinstatement. I could not. The contract of sale has two components which are relevant to this application. The one is the commercial component and the other is the employment relationship one. In my view, the two components are not two indivisible agreements as contended by the applicants. As I understood their argument, the first respondent’s ability to pay the remainder of the purchase price in the second phase was completely intertwined with, and dependant on the second applicant’s temporary contract of employment as area manager. This was not borne out by the evidence.

[29] The contract also refers to a proper contract of employment to be drafted, which did not eventuate. The fact that a formal, separate contract employment was not drafted, does not detract from the fact that an employment relationship existed over and above the agreement of sale. If the second applicant, for whatever reason, could no longer be employed by the first respondent, the latter would still be liable to pay the first applicant the remainder of the purchase price (R4 million) for the purchase of the business.

[30] The fact that a separate formal employment contract had not yet been drafted, did not automatically invoke the provisions of clause 17 (the mediation/arbitration clause) of the sale agreement, in the case of misconduct. The parties envisaged two agreements in the contract signed by them. One was for the second appellant's employment and the other for the contract of sale. This fact tends to militate against the notion that the parties should have embarked on a mediation process when a managerial employee (even if he is a party to the sale) misconducts himself in the manner as alleged by the employer (purchaser). The agreement to draft a proper employment contract later, is the strongest indication that there was an agreement that disciplinary matters would not be dealt with by way of mediation as envisaged in clause 17 of the agreement. That clause pertained to other possible disputes, not of an employment nature, which may arise between them.

[31] The second applicants' entire attack on his dismissal, including the alleged contravention of the arbitration clause in the sales agreement, are matters which should be raised in a Labour Forum, not this Court.

[32] Consequently, the application is dismissed with costs.

Counsel for the Applicants:	Adv TA Barnard
Instructed by:	Friedman Scheckter Attorneys
Instructed by:	Davout Wolhuter and Associate
	(1 st and 2 nd Applicants' Attorney)

Counsel for the Respondents: Adv SD Maritz
Instructed by: Goldberg & De Villiers Inc.

PARTIES: ROYAL ALBATROSS (PTY) LTD AND 1 OTHER
v
DEKRA AUTOMOTIVE (PTY) LTD AND 1 OTHER

- Case Number: 1669/2010
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- Date Heard: 1 July 2010
- Date Delivered: 15 July 2010

JUDGE(S): Revelas J

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): Adv TA Barnard
- for the Respondent(s): Adv SD Maritz

Instructing attorneys:

- Applicant(s): Friedman Scheckter Attorneys
Davout Wolhuter and Associate (1st and 2nd Applicants' Attorney)
- Respondent(s): Goldberg & De Villiers Inc.

CASE INFORMATION –

- (e) *Nature of proceedings:*
(f) *Key Words:*

